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Office Supreme Court U.S.
FILED
DEC 4 1902
JAMES H. McKENNEY,
Clerk

No. 216.

Brf. of Kittredge for Appellee

Filed Dec. 4, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1902.

NO. 216.

THE UNITED STATES,
Appellant,
vs.
JAMES A. RICKERT, AS COUNTY TREASURER IN AND FOR ROBERTS COUNTY, SOUTH DAKOTA,
Appellee.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

A. B. KITTREDGE,
W. D. LANE,
Solicitors for Appellee.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This suit was brought by the United States at the October 1900 term of the United States Circuit Court for the District of South Dakota, to restrain the defendant James A. Rickert, as county treasurer of the County of Roberts, S. D., the collector of taxes under the law of that state, from seizing and selling certain personal property belonging to certain Indians for taxes assessed against such property for the years 1899 and 1900.

The bill alleges that the said Indians hold allotted lands within

Roberts county and within the former Sisseton Indian Reservation, under the provisions of the agreement of December 12, 1889, as ratified by the Act of Congress of March 3, 1891, and under Sec. 5 of the General Allotment Act approved February 8, 1887; that the property sought to be taxed consists of issue stock and farm implements issued to the Indians by the United States, and certain improvements on said allotted lands consisting of houses, barns, etc. A demurrer to said bill having been filed by appellee, at the hearing thereon the Court sustained the demurrer and, appellant failing to amend its Bill of Complaint as permitted by the Court, a decree was duly entered dismissing the same upon its merits. From this decree the complainant appealed to the Circuit Court of Appeals, Eighth Circuit, and this suit is here on a certificate from that Court.

In the Circuit Court, District of South Dakota, appellant unsuccessfully sought a temporary injunction.

106 Fed., 1.

BRIEF.

The lands held by the allottee Charles R. Crawford, and the other Indians named in the bill were subject to assessment and taxation by the taxing authorities of Roberts County, South Dakota, in 1899 and 1900:

Section 11, c. 405, p. 891, 25 Stat., provides as follows:

"That upon the approval of the allotments provided for in this act by the secretary of the interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever, and patents shall issue accordingly. And

each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of the act approved February eight, 1887, entitled 'An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and of the territories over the Indians and for other purposes.' Provided, that the president of the United States may in any case, in his discretion, extend the period by a term not exceeding ten years; and if any lease or conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such lease or conveyance or contract shall be absolutely null and void."

Section 6, c. 119, p. 390, 24 Stat., referred to in the foregoing section, is as follows:

"That upon the completion of said allotments and the patenting of the lands of said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or inforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The compact between the United States and the State of

South Dakota upon the subject in issue (Article 22, South Dakota Constitution), is as follows:

Second. That we, the people inhabiting the State of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the State of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. *But nothing herein shall preclude the State of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person, a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation.* All such lands which may have been exempted by any grant or law of the United States shall remain exempt to the extent and as prescribed by such Act of Congress.

See also Act of Congress of February 22, 1889, par. 2. section 4.

No treaty or Act of Congress will be found which undertakes to exempt allotted lands from taxation.

The political status of Indians who have taken land in severalty and become citizens under the Dawes Act, is fully and ably discussed in

State vs. Denoyer, (*6 N. D.*), *72 N. W.*, *1014*.

In *Keokuk vs. Ulam*, *38 Pac.*, *1080*, the political rights of the

Indians are fully stated: "He is now surrounded with the protection of the law, and entitled to the benefit of the new order of things. He has the right in common with other citizens to use the public schools for his children, if he has any; and if his family becomes indigent, they are entitled to the aid of the territory and county in such almshouses as may be established for the unfortunate poor of the county. If insanity afflict him, he will be provided under the law with provisions made for the insane. When roads and bridges are built, they will be for his use. Courts are held into which they may come for the redress of any wrongs which may be inflicted upon them. He may sue and be sued. If the property sought to be taxed in this action be stolen, he may apply to the legally constituted authorities for its recovery, and, again, for the punishment of the offender."

By the Acts of Congress under which these patents were granted it is plain that Congress intended the Indians to receive the full protection of the local laws and to become citizens of the states which they inhabit. The Indians in Roberts county have always availed themselves of the privilege of applying to the state courts for the redress of their grievances, and they are made citizens of the state and qualified electors by Par. 1, Art. 7, of the Constitution of the State of South Dakota, which is as follows:

"Every male person resident of this state who shall be of the age of twenty-one years and upwards, not otherwise disqualified, belonging to either of the following classes, who shall be a qualified elector under the laws of the Territory of Dakota at the date of the ratification of this constitution by the people, or who shall have resided in the United States one year, in this state six months, in the county thirty days, and in the election precinct where he offers his vote ten days next preceding any election, shall be deemed a qualified elector at such election:

First. Citizens of the United States.

Second. Persons of foreign birth who shall have declared their intention to become citizens conformable to the laws of the United States upon the subject of naturalization."

As is said in the opinion of the Circuit Court in this case,

"They have all the rights and privileges of any citizen of the United States residing within this state. They have a voice in the making of the laws of the state. They are shielded and protected in their persons and property by the laws of the state. They have a voice equal to any other citizen in the imposition of any tax upon their property. They have the same voice as any other citizen in making the laws of the State of South Dakota, which determine what property shall be taxed, and how it shall be classified for taxation. The inquiry now arises, are these Indians, after having been clothed with all these rights and privileges, entirely relieved from assuming and bearing their share of the burden which every citizen bears, in return for these privileges and rights which appertain to citizenship? * * * If these Indians, in regard to the property described in the bill, are not subject to taxation now, when, if at all, will they ever be liable to taxation? What can happen in the future that will render them any more liable to taxation than they are now?"

Must Roberts county at a great expense provide all these privileges, and yet be unable to derive any revenue from them whatever partially to reimburse itself therefor? Such a holding would certainly work a great hardship. A large part of the Sisseton-Wahpeton reserve is located in Roberts county; the land of the Sisseton and Wahpeton Indians constitutes a goodly proportion of the county. The cost which these Indians are to the county is greatly in excess of any revenue that may be derived from their taxation. The burden, which should be properly shared by the nation as a whole, is borne by the comparatively few settlers of Roberts county. It is now proposed by this suit to cut off the little revenue from these Indians and throw the whole cost of preserving to them their political rights upon Roberts County. Surely this should not be done unless the law is such as to render such a decision inevitable. Rather than cut off this source of revenue the United States should make provision for paying into the treasury of Roberts county, taxes on Indian lands.

SECOND.

The permanent improvements, such as houses and other structures, upon the lands held by allotment by Charles R. Crozeford and the other Indians named in the bill, were subject to assessment and taxation by the taxing officers of Roberts county as personal property in 1899 and 1900.

The property sought to be taxed, other than purely personal, is classified by the statutes of the State of South Dakota as personal property for purposes of taxation. Sec. 4, Chap. 28, of the Laws of South Dakota, 1897, is as follows:

Personal Property Defined.—Personal property shall for the purpose of taxation, be construed to include all goods, chattels, moneys, credits and effects, wheresoever they may be; all ships, boats and vessels belonging to the inhabitants of this state, whether at home or abroad, and all capital invested therein; all moneys at interest, whether within or without this state, due the person to be taxed and all other debts due such person; all public stocks and securities; the capital stock of all insurance companies organized under the laws of this state; all stock in turnpikes, railroads, canals and other corporations, except national banks out of the state, owned by the inhabitants of the state; all personal estate of moneyed corporations, whether the owners thereof reside in or out of the state, and the income of any annuity, unless the capital of such annuity be taxed within the state; all shares of stock in any bank organized, or that may be organized, under any law of the United States or of this state, *and all improvements made by persons upon lands held by them under the laws of the United States* and all such improvements upon lands the title of which is still vested in any railroad company, or any other corporation whose property is not subject to the same mode and rule of taxation as other property.

This is a very common statutory provision. Property may be real estate for one purpose and personalty for another.

Cooley on Taxation, (second ed.), p. 366.

Forbes vs. Gracey, 94 U. S., 762.

State vs. Red R. Val. El. Co., 72 N. W., 60.

State vs. Tucker, 56 N. W., 718.
People vs. Shearer, 30 Cal., 645.
Crocker vs. Donovan, 30 Pac., 374.

As between the State of South Dakota and its white citizens the legislature had an undoubted right to make this classification. It is competent for the legislature to make any kind of property personalty for the purpose of taxation, though it is real estate at common law and for all other purposes.

Johnson vs. Roberts, 102 Ill., 655.

The power to tax is an attribute of sovereignty. It is of the same nature as the right of eminent domain. It is a prerogative necessary to the continued existence of the state. It is never presumed to be surrendered.

All property is subject to taxation unless exempted by the express provision of some constitution, statute or treaty, and all such exemptions are strictly construed. Immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken.

Chicago, etc., Ry. Co. vs. Guffey, 120 U. S., 569.
Cooley on Taxation, pages 204 and 205.
Volume 25 Encyc. of Law, page 157.
Waller vs. Hughes, 11 Pac., 122.
Chicago, B. & K. C. Ry. Co. vs. Missouri, 7 S. Ct., 693.

In the Court below the appellant contended that improvements on Indian lands held in severalty are a part of the real estate, and therefore, cannot be taxed without a charge upon the real estate. It is not so held in other analogous cases. It has been repeatedly held that improvements upon public lands are taxable as personalty.

As stated by the learned Circuit Court, the improvements upon these lands are analagous to those upon public lands entered as homesteads Such improvements are clearly taxable; they are not the property of the United States.

Crocker vs. Donovan, 30 Pac., 374.
State vs. Tucker, 56 N. W., 718.

And not only such improvements, but those on other public lands as well.

People vs. Shaarer, 30 Cal., 656.

Territory vs. Clark, 30 Pac., 882.

Forbes vs. Gracey, 94 U. S., 762.

The mere fact that the legal title to lands is in the United States, does not exempt them from taxation.

Northern Pac. Ry. vs. Walker, 47 Fed., 681.

See also:

Cooley on Taxation, (second ed.), pages 87 and 366, and cases there cited.

The interest of a lessee of government lands is taxable.

Garland Co. vs. Gains, (Tex.) 19 S. W., 602.

Improvements are not an interest in real estate under the statute of frauds.

Pierson vs. Daniel, 1 Iowa, 20.

Improvements on public lands are property and a sufficient consideration to sustain a promise to pay for same.

Brooks vs. Hiatt, 13 Neb., 503.

They are recognized as property by the occupying claimants acts.

If not taxable in this case, it must be by reason of the fact that it is exempt by some paramount law, or that the United States has such an interest therein as to make the tax one upon government property.

THIRD.

The personal property, consisting of cattle, horses and other property of like character, which had been issued to these Indians by the United States and which they were using upon their allotments was liable to assessment and taxation by the taxing officers of Roberts county in 1899 and 1900.

The accuracy of this statement has not as yet been questioned by the government's counsel. Neither in the Circuit Court nor in the Court of Appeals was it suggested that personal property, described as "issue stock," was not liable to assessment and taxation.

It was issued to the Indians for their use, and they have been allowed to use it as their own, free from let or hindrance by the United States. They have been and now are allowed to dispose of it. They certainly have a taxable interest in it. If it is seized and sold for taxes, the United States is in no way bound to replace it. When delivered the government parted with all interest in and control over it.

FOURTH.

The United States has not such an interest in this controversy or in its subjects as entitles it to maintain this suit.

As appears on the face of the bill, the United States has issued to the Indians therein named what is termed a trust patent, and by the terms of the trust has become a mere naked trustee. By the terms of such patent the government agrees to give to the patentee a full patent at the expiration of 25 years from a certain date, or at such later date as the president may determine. The Indian has nothing further to do. He must simply await the expiration of the time limit above mentioned.

In *Ry. Co. vs. Prescott, 16 Wallace, at page 608*, Mr. Justice Miller announced the rule: "While we recognize the doctrine "heretofore laid down by this Court that lands sold by the United "States may be taxed before they have parted with the legal title "by issuing a patent, it is to be understood as applicable to cases "where the *right* to the patent is complete, and the equitable title "is fully vested in the party without anything more to be paid, or "any act to be done going to the foundation of his right."

We submit that the mere delay is not an act going to the foundation of the Indian's right. The purpose of this delay is entirely clear. It is to prevent the alienation by purchase and sale on the part of the patentee. It does not in express terms, or even by implication, exempt the Indian from taxation.

Mr. Justice Brewer, then upon the Supreme bench of Kansas (*Gulf Ry. Co. vs. Morris, Treas., 13 Kansas, pages 302-318-319*), in commenting upon the language of Mr. Justice Miller, *supra*, stated: "Nor do we think the restriction on the company's dis-

posal of the land a restriction on the right of taxation. The government retained by it no interest in the land. The equitable interest of the company was in no wise limited. It was a naked restriction on the right to dispose or incumber. There is no reason for making it the basis of an exemption from taxation.

See also *Kansas Pac. Ry. vs. Culp, 9 Kan., 31.*

The only interest the United States has is to be able at the end of twenty-five years from the date of the allotment to convey the *land* free from any charge or incumbrance. If a home upon Indian land were seized and sold for taxes, will that prevent the United States from conveying the *land* free from any charge or incumbrance? Could the Indians claim any breach of contract on the part of the United States? If these taxes are paid by the Indians could the United States in any manner become liable therefor? Would it be necessary for the United States to pay these taxes in order to fulfill its contract to convey the land free from any charge or incumbrance? If these questions are answered in the negative, as they must be, then it must be conceded that the United States has no such interest in the improvements on the lands described in the bill as to entitle it to maintain this suit.

FIFTH.

The United States has a remedy at law so prompt and efficacious that it is deprived of all relief in equity.

If the United States is the owner of the personal property in question, it has an adequate remedy at law. If the "improvements" assessed as personal tax are a part of the realty of which the appellant is the legal owner, then the suit will not lie because property of the United States cannot be taxed by the state and a court of equity will not enjoin the attempted enforcement of an illegal tax.

Honnewickle vs. Georgetown, 15 Wallace, 547.

See also *McHenry, et al, vs. Britt, 81 N. W., page 65.*

If, on the other hand, the appellant seeks to maintain this suit on the sole ground of its naked trusteeship for the Indians,

then the suit will not lie because there is an adequate remedy at law, and on this phase of the case the authorities are clear.

It is a well established principle of equity jurisprudence that mere illegality of a tax is not sufficient ground for equitable interference. Says Mr. Cooley, "It would be a great stretch of equitable principles."

Cooley on Taxation, Secs. 760-772-774.

High on Injunctions, Sec. 505.

Until the taxes have been paid, no wrong has been suffered. When they have been paid, they can be recovered back in an action at law, which furnishes an adequate remedy. It has been so held by the most respectable of our state courts.

Brewer vs. Springfield, 97 Mass., 152.

Lond vs. Charleston, 99 Mass., 208.

Bank vs. Supervisors of Broome Co., 25 N. Y., 314.

The unlawful collection of a tax by distress or seizure and sale of chattels is no more than an ordinary tresspass, for which there is an ample remedy at law.

Odlin vs. Woodruff, 12 So., 227 (Fla.)

Ritter vs. Patch, 12 Cal., 298.

The principle that illegality of tax alone is not sufficient to justify equitable interference, but that there must be other grounds bringing the case clearly under equitable jurisdiction, is not less firmly established by decisions of the United States Supreme Court.

Dows vs. City of Chicago, 11 Wall., 108.

Honnewickle vs. Georgetown, 15 Wall., 547.

State Railroad Tax Case, 92 U. S., 575.

The latter case calls attention to Sec. 3224 Rev. Stat., which reads: "No suit for the purpose of restraining the collection of *any tax shall be maintained* in any Court," and the Court commenting thereon says that this statute was enacted that there might be no missunderstanding of the universality of this principle, and that though it was intended to apply only to taxes levied by the United States, yet it shows the sense of Congress of the evils to be feared if Courts could *in any case*, interfere with

the process of collecting taxes on which the government depends for its continued existence. "It is a wise policy."

A grievance which can be remedied by a suit at law either before or after payment of the tax will not authorize an injunction.

Upon the principles announced and the authorities cited we believe this court will answer the questions as herein suggested.

Respectfully submitted,

A. B. KITTREDGE,

W. D. LANE,

Solicitors for Appellee.